SUPREME COURT, U.S.
FILED

(1)

97 7178 APR 20 1998

OFFICE OF THE CLERK

Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

Marilyn Moss, Petitioner,

vs.

Peggy Garrity, Peggy Garrity, a Corporation, Douglas Benedon, Gerald Serlin and Benedon & Serlin, a Partnership, Respondents.

[California Supreme Court Case No. S066408]

PETITION FOR WRIT OF CERTIORARI

MARILYN MOSS
22203 Pacific Coast Highway
Malibu, CA 90265-5055
(310) 317-1202
Petitioner, *in pro per*

69 pp

QUESTIONS PRESENTED

1. Whether or not the 45% attorney contingency fee contract violates the Equal Protection Clause and/or the Supremacy Clause of the United States Constitution.
2. Whether or not an Unconstitutional attorney contingency fee contract is voidable;
3. Whether or not litigation of Federal Court Attorney fees in State Court is Unconstitutional and barred by res judicata and collateral estoppel; and
4. Whether California Court's misapplication of Statute of Limitations law violates the Procedural Due Process Clause of the United States Constitution resulting in a miscarriage of justice and reversible error.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i.
TABLE OF CONTENTS		ii.
PARTIES		iii.
TABLE OF AUTHORITIES		iv.
JURISDICTION		vi.
PETITION IS TIMELY		1
CONSTITUTIONAL AND STATUTORY PROVISIONS PRESENTED IN THIS CASE		1
I.	STATEMENT OF THE CASE	3
II.	LEGAL DISCUSSION	9
(A)	The 45% Attorney Fee Contingency Contract is Unconstitutional and Excessive;	9
(B)	An Unconstitutional Attorney Contingency Fee Contract is Voidable;	11
(C)	Litigation of Federal Question Attorney Fee Claims in State Court is barred by res judicata; and	15
(D)	State Court misapplication of Statute of Limitation Law is reversible error.	18

Table of Contents (continued) Page

III. WHY A WRIT SHOULD BE ISSUED 27

IV. CONCLUSION 28

PETITIONER'S APPENDICES

PARTIES

Petitioner:

Marilyn Moss
22203 Pacific Coast Highway
Malibu, CA 90265
(310) 317-1202

Respondents:

Jonathan B. Cole, Esq.
Karen Coffin, Esq.
Nemecek & Cole
15260 Ventura Blvd. Suite 920
Sherman Oaks, CA 91403
(818) 788-9500
Attorneys for Respondent
Peggy Garrity, et al.

Rebecca Weinreich, Esq.
Sedgwick, Detert, Moran & Arnold
801 S. Figueroa Street, 18th Floor
Los Angeles, CA 90017
(213) 386-2833
Attorneys for Respondents
Benedon & Serlin et al.

TABLE OF AUTHORITIES

	Page
CALIFORNIA CASES	
Alderman v. Hamilton 205 Cal.App.3d 1033, 252 Cal.Rptr. 845 (1988)	14
Budd v. Nixen 6 Cal.3d 195, 98 Cal.Rptr. 849 (1971)	22
Gay Law Students Assn. v. Pacific Tel. & Tel. Co. 24 Cal.3d 458, 156 Cal.Rptr 14, 595 P.2d 592 (1979)	11
Nichols v. Keller 15 Cal. App.4th 1672, 19 Cal. Rptr. 601 (1993)	23
Otworth v. Southern Pacific Transportation Co. 166 Cal.App.3d 452, 212 Cal.Rptr. 743 (1985)	12
Schultz v. Harney 27 Cal. App.4th 1615, 33 Cal.Rptr.2d 276 (1994)	16, 22
FEDERAL CASES	
Joos v. Intermountain Health Care, Inc. 25 F.3d 915 (10th Cir. 1994)	28
Palomas Land & Cattle v. Baldwin 189 F.2d 936 (1951)	17, 23, 28
Testa v. Katt 330 U.S. 386, 67 S.Ct 810 (1947)	17

STATUTES	Page
California Business & Professions Code §6146(a)	11, 27
California Business & Professions Code §6147(b)	13, 15
California Code of Civil Procedure §337	14, 26
California Code of Civil Procedure §1908	19
California Constitution, Art. I, §7(a)	11
California Constitution, Art. VI, §10	18, 19
California Constitution, Art. VI, §13	14
California Rule of Professional Conduct 4-200	13, 15
ERISA Statute 29 U.S.C. § 1132(g)	17, 19
Federal Arbitration Act Statute 9 U.S.C. § 1 et al.	18
Federal Arbitration Statute 28 U.S.C. §§ 652, 1652	18
Federal Rule of Civil Procedure 54(d)	17
Federal Rule of Civil Procedure 81(c)	17, 19
United States Constitution Art. VI, Cl.2	17
United States District Court Local Rule 16.10	17

Other Authorities	Page
Mallen & Smith, Legal Malpractice, 4th Ed. (1996), §14.1, pp.229-230	24
8 Witkin, Summary of Law Ninth Edition, "Constitutional Law" §603	11

JURISDICTION

The United States Supreme Court has jurisdiction to review this matter based on 28 U.S.C. Section 1257(a) which holds that review by certiorari or appeal of decisions of the highest court of a state in which a particular decision can be rendered on federal questions.

THIS PETITION IS TIMELY

According to U.S. Supreme Court Rules, a Petition For Writ of Certiorari must be filed within ninety (90) days from the date the state ruling is final. In this case, the California Supreme Court denied Petitioner's Petition For Review on January 21, 1998. This Petition For Writ of Certiorari is filed within 90 days of that denial and is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS PRESENTED IN THIS CASE

1. U.S. Constitution Fourteenth Amendment - Right to Equal Protection of laws of the state.
2. Supremacy Clause of the United States Constitution, Art. VI, Cl. 2 which requires that when state laws conflict with federal laws, federal laws must apply.

3. **Federal Arbitration Law at 9 U.S.C. Sections 1, 2, and 4 and 28 U.S.C. Section 652 requiring that any contractual arbitration be voluntary and not forced upon unwilling party.**

4. **California Business & Professions Code Section 6146(a) which protects one segment of injured citizens in California but does not protect other injured citizens from unscrupulous attorneys and excessive attorney fees.**

5. **California Code of Civil Procedure Section 1908(b) - states that California Courts must give a federal judgment conclusive effect and that the definition of a party to a federal case is one who (1) has an interest in the judgment and (2) is in privity with a party.**

6. **California Constitution Art. VI, Sect. 10 - states that California Courts only have jurisdiction so long as no other court has statutory jurisdiction.**

7. **Employee Retirement Income Security Act of 1974 ("ERISA") - 29 U.S.C. Sect. 1132(a) which includes attorney fee provisions at 29 U.S.C. 1132(g).**

8. **Federal Rules of Civil Procedure 54 - controls attorney fees in U.S. District Court.**

9. **Federal Rules of Civil Procedure 81(c) states that after removal to federal court, U.S. District Court has exclusive jurisdiction over every aspect of the case and that state courts lack jurisdiction unless the case is remanded.**

10. **U.S. District Court (California Central District) Local Rule 16.10 requires that attorney fee claims be filed with the U.S. District Court within 30 days from the date the Judgment is entered.**

I. STATEMENT OF THE CASE

This is a legal malpractice, breach of fiduciary duty and breach of contract attorney/client case. Petitioner was the plaintiff and Respondents' client in an employment discrimination case which was removed to Federal Court based on ERISA in 1989 and the case was resolved by jury trial in U.S. District Court in June, 1992. There were two sets of attorneys in the Moss v. Santa Fe Railroad case. The first attorneys abandoned the case and second attorney, Peggy Garrity, substituted in right before the jury trial in 1992. Garrity's sole task was to present the case to the jury in a one-month trial in U.S. District Court, Los Angeles, California. For her 3-week performance before a jury, Garrity charged $1,350,000. In the underlying federal court case entitled Moss v. Santa Fe Railroad CV89-5909KN(Ex), attorney Peggy Garrity, with knowledge of a 40% lien already on the Moss v. Santa Fe Railroad case, charged and collected unconscionable and unlawful attorney fees of another 45% or $1,350,000 in cash. The total attorney fee lien on the case then exceeded 85% of the client's $3 million dollar

personal injury judgment which concluded on June 11, 1992. Petitioner subsequently hired attorneys Walsh and Benedon to right the wrong, however, Walsh and Benedon failed to properly resolve the dispute because of their own negligence and incompetence. As stated in Petitioner's Verified Complaint, the information which forms the basis of this case was unknown by Petitioner until March 24, 1996 during a hearing in Petitioner's bankruptcy case.

The parties involved in this appeal are the client, Marilyn Moss, who is the Petitioner, Peggy Garrity et al., Respondents, who were the second set of attorneys in the Moss v. Santa Fe Railroad federal court trial and absconded with $1,350,000 or 45% of the Judgment for conducting one 3-week trial and Douglas Benedon et al., Respondents, were hired to file appellate briefs to correct the excessive attorney fee charges, but who themselves turned out to be incompetent, negligent and charge excessive attorney fees. In the instant legal case, lower courts abused discretion when they sustained Demurrer Without Leave to Amend based solely on one inapplicable 10th Circuit Utah case and a

misapplication of statute of limitation law. Petitioner seeks reversal of that erroneous ruling so she will have the opportunity to present her legal malpractice, breach of fiduciary duty and breach of contract causes of action to a jury of her peers.

Specifically, on October 29, 1996, Los Angeles Superior Court abused discretion when it sustained demurrer of the Garrity and Benedon parties and all causes of action in this Moss v. Garrity, Benedon and Walsh case based on the 10th Circuit Utah case entitled Joos v. Intermountain Health Care, Inc. 25 F.3d 915 (10th Cir. 1994)("Joos").

The 10th Circuit Joos case, which California state courts are not bound to follow directly conflicts with the Ninth Circuit case of Palomas Land & Cattle v. Baldwin 189 F.2d 936 (1951) which California courts are bound to follow. This United States Supreme Court is the only Court that can resolve the conflict between the Ninth and Tenth Circuit cases. In Joos, the client, Carla Joos won a judgment of $503,000 in U.S. District Court. Carla Joos received her $503,000 judgment when the case was concluded. Carla Joos'

attorney then applied for and was paid statutory attorney fees pursuant to the ERISA statute by Defendant Intermountain Health Care, Inc.

In the instant federal court case of Moss v. Santa Fe Railroad CV89-5909KN(Ex), neither set of attorneys ever applied for attorney fees under the ERISA statute, which they could have done. Then, in Joos, Carla Joos' attorney sought additional attorney fees based on his contingency fee contract with Carla - from the Defendants in that case - not from Carla Joos, his client. In Joos, there was mention that Carla Joos' attorney may have had an implied or an oral contract with the Defendant Intermountain Health Care, Inc. in that case to pay additional attorney fees which makes that attorney fee matter separate and distinct from the ERISA lawsuit itself. In Joos the facts are totally different from this case.

By contrast in the underlying case, Petitioner Marilyn Moss had two sets of attorneys in the original U.S. District Court case of Moss v. Santa Fe Railroad CV89-5909KN(Ex). Neither of the two

sets of attorneys ever applied for or received statutory attorney fees from Defendant Santa Fe Railroad. Instead, Marilyn Moss' attorneys attacked her and her judgment in state court. Under the 46-year old Ninth Circuit case of Palomas Land & Cattle v. Baldwin 189 F.2d 936 (1951), cases arising under a Federal statute and are heard and determined by Federal Courts, the allowance or disallowance of costs and attorney fees are governed by federal law, not state law. Carla Joos' Judgment was not attacked or re-litigated in Utah as has occurred in the instant case because of the negligence of Garrity and Benedon.

In the underlying Moss v. Santa Fe Railroad federal court case, Petitioner has been has been relentlessly attacked by her own attorneys in state court for over five years. It continues to go on and on now in two courts. That is wholly different than what happen in Joos. Never at any time did Carla Joos attorney attack or take away any part of Carla Joos $503,000 federal court judgment. In the instant case, however, the two sets of attorneys have

relentlessly attacked Marilyn Moss and her federal judgment to the extent that the attorneys have now robbed their client of her entire $3 million personal injury federal court judgment. In practical terms, this means that the injured client, Marilyn Moss, has now ended up with nothing and her already rich attorneys are now $3 million dollars richer! This is extremely unfair as well as unlawful and unconstitutional. Marilyn Moss is asking for her day in Court to straighten this out.

In Joos, Carla Joos was allowed to get on with her life with her $503,000 personal injury judgment in tact. Carla Joos nor her federal judgment was ever attacked by her own attorneys in Utah courts or anywhere else. The subsequent dispute was between her ethical attorney and the defendants in that case, not between the attorney and client. As such, the trial court in the instant case erred in applying the principles of Joos to this matter and abused discretion by Sustaining Demurrer Without Leave To Amend concerning numerous causes of action which were never addressed

in the Joos case. As a matter of law, the lower court's ruling should be reversed.

II. LEGAL DISCUSSION

A. A 45% CONTINGENCY ATTORNEY FEE IS UNCONSTITUTIONAL AND EXCESSIVE.

The Moss-Garrity 45% Retainer Agreement is unconstitutional because it violates the Equal Protection Clause of the California Constitution and the United States Constitution. That is because other injured California citizens who happen to be injured by a health care provider rather than by their employer are protected from excessive attorney fees by statute. The majority of California citizens, including Petitioner, are discriminated against under the laws such as is occurring here.

Article I, § 7(a) of the California Constitution expressly prohibits the denial of equal protection of the laws. Gay Law Students Assn. v. Pacific Tel. & Tel. Co. 24 Cal.3d 458, 468, 156 Cal.Rptr. 14, 595 P.2d 592 (1979). In addition, the California

Constitution contains a number of provisions calling for uniformity in legislation. They go further than the Fourteenth Amendment, particularly in invalidating legislation where the basis for classification is wholly unreasonable, although the person raising the challenge does not show any direct denial of equal protection as to him. (8 Witkin, Summary of Law Ninth Edition, "Constitutional Law" §603).

Under *Business & Professions Code* § 6146(a), the class of California citizens who happen to sustain personal injury by a health care provider are protected against excessive attorney contingency fees by statutory limits as follows: (1)"The limits are 40% of the first $50,000 recovered; 33 1/3% of the next $50,000; 25% of the next $100,000; and 10% of any excess above $200,000. If Petitioner Marilyn Moss had sustained her personal injuries by her health care provider rather than by her employer, her total maximum contingency fee payment would be $341,666 as applied to her $3 million dollar personal injury judgment. By contrast, and

because all other classes of injured California citizens, including Petitioner, are not protected by a ceiling on contingency fees, the amount being charged in the instant case is in excess of $1,950,000 (plus interest) and another $300,000 in costs for litigation and trial expenses. This is unconstitutional, inequitable and in the interest of equal protection for all injured Californians, this matter should be both reviewed and reversed.

B. AN UNCONSTITUTIONAL ATTORNEY FEE CONTRACT IS VOIDABLE.

In Otworth v. Southern Pacific Transportation Co. 166 Cal.App.3d 452, 458-59, 212 Cal.Rptr. 743 (1985) the court stated: "To state a cause of action for breach of contract, [plaintiff] must plead the contract, his performance [defendant's] breach and the resulting damage. . ." In the first instance, the Moss-Garrity retainer contract was unethical, unlawful and unconstitutional. The 45% retainer agreement is not only unethical under California Rule of Professional Conduct 4-200 because it is excessive, exorbitant

and unconscionable and unconstitutional because it violates the Equal Protection Clause of the California and U.S. Constitution, but it also fails to comply with *Business & Professions Code* § 6147(b). *Business & Professions Code* § 6147(b) which requires all contingency fee agreements be in writing and mandates all of the following be included: [1] a statement of the rate, a statement of how disbursements and costs will affect the contingency fee and the client's recovery, [2] a statement regarding related matters, and [3] a statement that the fee is not set by law but is negotiable. If the contingency fee agreement does not comply with these requirements, it is *voidable at the option of the client* and the attorney is then entitled to a reasonable fee for services performed. Alderman v. Hamilton 205 Cal.App.3d 1033, 1037, 252 Cal.Rptr. 845 (1988). As noted when reading the Moss-Garrity retainer contract, the required information is not present. Under California law, statute of limitations on a written contract is 4-years. California Code of Civil Procedure § 337. The contract was

breached when Garrity knowingly filed a frivolous complaint of malpractice before the trial had been conducted and with knowledge it is impossible for there to have been damages on May 11, 1992. This matter was timely filed May 7, 1996, within 4-years.

It is reversible error *per se* for lower courts to ignore an error which results in a miscarriage of justice. *California Constitution Art. VI, Sect. 13.* The lower courts have ignored the record, the statements in the Amended Verified Complaint and the Appellant's Opening Brief. As noted, the California Constitution is unequivocal in it's plain language. A true copy of the provisions of the Garrity-Moss Retainer Agreement are attached to this Petition as part of Petitioner's Appendices.

As is easily noted within the four corners of the Garrity-Moss contract, it is *voidable* at the client's wishes because it does not comply with Business & Professional Code § 6147(b). The Moss-Garrity retainer contract fails to state what the effect will be on the client's recovery after disbursement of costs, there is no statement

which says the contract is not set by law but is instead negotiable and most importantly, the retainer agreement does not address the potential that the client will be assessed double contingency attorney fees, Garrity knew of Burton and Huerta's representation in the matter and the "modification agreement" client Marilyn Moss was forced to sign on September 13, 1991. In reckless disregard of the interests of her client attorney and with knowledge her client, Marilyn Moss may be subjected to double attorney fees, Garrity entered into a 45% contingency fee agreement with Marilyn Moss.

The Moss-Garrity Retainer Agreement also constitutes *prima facie* legal malpractice because it is unethical pursuant to California Professional Conduct Rule 4-200 (A) which states: "A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Any reasonable person would conclude that $1,350,000 is excessive for conducting one 3-week trial and this is one of the issues Petitioner is entitled to present to a jury of her peers. An attorney's breach of ethical duties owed to her client is

"legal malpractice" by definition and is actionable. Schultz v. Harney 27 Cal.App.4th 1615, 1621, 33 Cal.Rptr.2d 276, 281 (1994). On this basis alone, the lower court's ruling should be reversed.

C. STATE COURT LITIGATION OF FEDERAL COURT ATTORNEY FEES IS UNCONSTITUTIONAL.

Neither Garrity nor Benedon asserted the defense that litigation or non-judicial arbitration of Federal Court Attorney Fees by state court is unconstitutional. The information this defense is based on was not discovered by Petitioner until March 24, 1996, during Petitioner's own U.S. Bankruptcy case entitled In re Moss, LA93-45777CA. The instant Verified Complaint was timely filed a few weeks later on May 7, 1996. Under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, if the United States Congress has enacted laws which conflict with state court laws, federal laws apply. Testa et al. v. Katt 330 U.S. 386, 67 S.Ct. 810 (1947).

Specifically, the United States Congress enacted Federal Rules of Civil Procedure which apply to attorney fee petitions, for the sole purpose that Federal Question litigants are required to use those laws to litigate allowance or disallowance of attorney fees in a federal question case. Palomas Land & Cattle v. Baldwin 189 F.2d 936 (9th Cir. 1951). F.R.C.P. §54(d), 29 U.S.C. §1132(g) and U.S. District Court, Central District Local Rule 16.10 were enacted by the United States Congress and occupy the field concerning the award of attorney fees in a Federal Question case where the U.S. District Court has asserted *exclusive* jurisdiction over the ERISA case pursuant to F.R.C.P. 81(c). Attorney fee claims in a federal question case must be decided under federal laws and U.S. District Courts have inherent jurisdiction to decide the federal issues.

Likewise, if attorney fee claims in Moss v. Santa Fe Railroad CV89-5909KN federal question case had been properly litigated under federal law, there would have never been an arbitration. The

United States Congress enacted the Federal Arbitration Act at 9 U.S.C. § 1, 2 and 4 and 28 U.S.C. § 652 and intended that federal court cases would use the statutes to resolve arbitration issues.

Federal Arbitration law preempts all state laws under the Supremacy Clause of the United States Constitution. 28 U.S.C. § 1652 Under proper federal law, this federal court case would never have gone to arbitration because 28 U.S.C. §652(a)(B) dictates that no matter may be arbitrated that exceeds a $100,000 claim. In this case, the claim was $600,000 or six times the amount allowed to be arbitrated under federal law.

The California Constitution also supports the United States Constitution at Article VI, § 10 which says: "Superior courts have original jurisdiction in all causes except those given by statute to other trial courts." After the Moss v. Santa Fe Railroad case was removed to U.S. District Court in October, 1989 and the U.S. District Court denied remand, that U.S. District Court asserted exclusive statutory jurisdiction over the Moss v. Santa Fe Railroad

case pursuant to F.R.C.P. § 81(c), 29 U.S.C. 1132(a),(d) and (g) for all purposes, including allowance or disallowance of attorney fee claims in the federal question case. The California Constitution Article VI, § 10 is codified in California law as California Code of Civil Procedure § 1908(a) and (b) which gives conclusive effect to federal court judgments and treats non-parties as parties who have a financial interest in the federal court judgment and the parties are in privity.

D. LOWER COURTS' MISAPPLICATION OF STATUTE OF LIMITATIONS LAW IS REVERSIBLE ERROR.

(1) MERITORIOUS CLAIMS OF LEGAL MALPRACTICE ARE TIMELY.

Courts must reverse a decision which constitutes a miscarriage of justice. If an attorney robs a client of her $3 million dollar personal injury recovery is not a miscarriage of justice, what is? Lower courts' assertion that Petitioner's claim for legal malpractice against Garrity is not timely is reversible error. In the opening

brief and in the Verified Amended Complaint, the facts of this matter clearly satisfy the timeliness element. The Verified Complaint, under penalty of perjury states that the information which supports this case was not discovered until March 24, 1996. The calculation by lower courts is erroneous and reversible error according to the plain language of the statute they quote in their November 4, 1997 decision. The applicable quoted statutory language is:

"(a) An action against an attorney for wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers. . ." [emphasis added] As stated in the Verified Complaint, Plaintiff Marilyn Moss did not DISCOVER the information or know DAMAGES until March 24, 1996 - and the Verified Complaint was filed within one year on May 7, 1996. The plain language of the statute also states on page 16 of the Court of Appeal decision when "(1) The plaintiff has not sustained actual

injury." That means the Court of Appeal statement the statute of limitations would begin to run when the attorney abandoned the case, i.e. on October 30, 1992 is reversible error. The statute says the time begins running when the client DISCOVERS the information or until the client IS DAMAGED.

A claim for legal malpractice must satisfy four elements: (1) The duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." Budd v. Nixen 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 852 (1971). There are no issues of legal malpractice in the Joos case. As a matter of law, an attorney has a duty to know applicable law relating to attorney fees. Shultz v. Harney 27 Cal.App.4th 1611, 33 Cal.Rptr.2d 276 (1994) Attorney Garrity committed legal malpractice when she first overcharged her client Marilyn Moss in

the sum of $1,350,000 for one 3-week trial which was conducted in half-days. Garrity also committed legal malpractice when she filed the legal malpractice complaint against Burton and Huerta on May 11, 1992 before there were any actual damages since the Moss v. Santa Fe Railroad trial had not yet commenced. Then, after the Moss v. Santa Fe Railroad case was won, Garrity, without advising client Moss, served the frivolous complaint on Burton and Huerta. Because the Moss v. Santa Fe Railroad case was won in federal court, there never were any actual damages, which Garrity knew. A professional has a duty to use such skill, prudence and diligence as other members of the profession commonly possess and exercise. Legal duties are not discoverable facts of nature. Rather they are merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done. Nichols v. Keller 15 Cal.App.4th 1672, 1685, 19 Cal.Rptr.2d 601 (1993). It was Garrity's idea to file the legal malpractice complaint before the Moss v. Santa Fe trial and she has admitted as much under oath.

Garrity's statement that she filed it because of statute of limitations is bogus because the statute of limitations does not start running until and unless there are "actual damages." That would have been if there had been a defense verdict in the Moss v. Santa Fe trial. The case was won. According to the 46-year old case of Palomas Land & Cattle Co. v. Baldwin 189 F.2d 936 (1951), the allowance or disallowance of attorney fees in a federal case must be decided under federal law, not state laws. Additionally, because Respondents put Petitioner Marilyn Moss in such a disastrous position, Petitioner was forced into bankruptcy in 1993. As is commonly known, filing a bankruptcy case stops the running of time as to any causes of action by the aggrieved debtor. In October, 1993, Petitioner was forced to file bankruptcy. From October 8, 1993 through May 31, 1996, the time stopped running. Accordingly, the instant legal malpractice case filed in May, 1996, was timely filed, even under the 1-year rule. Petitioner has been damaged in a sum exceeding $862,406.52 plus interest.

(2) BREACH OF FIDUCIARY DUTY CLAIMS ARE TIMELY.

Proper allegation of breach of fiduciary duty is by alleging that the attorney attained a "personal advantage . . . concerning the subject matter of" his or her retainer, or that "there are circumstances which create adversity to the client's interest [such as] an existing personal adverse interest of the attorney, an interest of a prior or subsequent client, or conflicting interests of present and multiple clients." (Mallen & Smith, Legal Malpractice, 4th Ed. (1996), §14.1, pp. 229-230.) There were no breach of fiduciary issues in the Joos case which is the sole authority the trial court used to sustain demurrer on this cause of action.

Attorney Garrity betrayed client Marilyn Moss' trust to her own personal advantage by taking advantage of Marilyn Moss when she was desperate and under duress. One day before the Moss v. Santa Fe Railroad jury trial was to begin, Garrity insisted on filing a frivolous legal malpractice case against first attorneys Burton and

Huerta. As is now known, Garrity, who by that time knew she had been handed a multi-million dollar case on a silver platter, filed the frivolous legal malpractice complaint as part of a strategy to dissuade Burton and Huerta from claiming fees. The clear personal advantage to Garrity is that if Burton and Huerta file no claim for fees - Garrity will get more money.

At the September 18, 1992 hearing in Los Angeles Superior Court, unknown to Petitioner, Garrity put her own financial interests first by intentionally deceiving State Court Judge Kitching by not informing Judge Kitching that Garrity had already received $1,350,000 in cash or 45% of the underlying Moss v. Santa Fe Railroad judgment. Likewise, Garrity failed to inform the state court that the Moss v. Santa Fe Railroad case had been fully litigated and went through jury trial in U.S. District Court. Garrity knowingly sold her client down the river while she knew her client was out of state taking care of her terminally ill Father. Garrity's malicious motives were not discovered until March 24, 1996.

(3) **BREACH OF WRITTEN CONTRACT CLAIMS ARE TIMELY.**

Under California laws, statute of limitations on breach of written contract is four (4) years. *California Code of Civil Procedure* §337. The instant verified complaint was timely filed within four (4) years on May 7, 1996 and the initial breach of the contract occurred on May 11, 1992 when Garrity wrongfully filed the frivolous legal malpractice complaint against the first set of attorneys in the Moss v. Santa Fe Railroad federal court case. The Fourteenth Amendment to the federal Constitution provides that no state shall "deny any person within its jurisdiction the equal protection of the laws."

Under *Business & Professions Code* § 6146(a), the class of California citizens who happen to sustain personal injury by a health care provider are protected against excessive attorney contingency fees by statutory limits as follows: (1)"The limits are 40% of the first $50,000 recovered; 33 1/3% of the next $50,000; 25% of the

next $100,000; and 10% of any excess above $200,000. If Petitioner Marilyn Moss had sustained her personal injuries by her health care provider rather than by her employer, her total maximum contingency fee payment would be $341,666 as applied to her $3 million dollar personal injury judgment. By contrast, and because all other classes of injured California citizens are not protected by a ceiling on contingency fees, the amount being charged in the instant case is in excess of $1,950,000 (plus interest) and another $300,000 in costs for the 5 years of litigation and trial expenses. Marilyn Moss is being deprived of her rights under the constitution and is being discriminated against because of the happenstance that her injuries occurred in the workplace instead of when she was under a health care professional's care. This situation also applies to any California citizen injured in any kind of auto accident or otherwise that they will be denied equal protection under the laws because they will be charged sky high attorney fees, maybe even a higher attorney fee than monetary recovery, such as is

occurring in the instant case. This is totally unfair, it is unconstitutional and this matter should be both reviewed and reversed.

III. WHY ISSUANCE OF A WRIT SHOULD BE GRANTED

Issuance of a Writ is needed to resolve the conflict between the Ninth Circuit's case of Palomas Land & Cattle v. Baldwin 189 F.2d 936 (9th Cir. 1951) which holds that attorney fee claims in a Federal Question case must be decided under Federal Law in U.S. District Court and the 10th Circuit Court case of Joos v. Inter Mountain Health Care, Inc. 25 F.3d 915 (10th Cir. 1994) which holds that State Courts may litigate Federal Question case attorney fee petitions. If State Courts can litigate Federal Court Attorney Fee Petitions which has the effect of destroying the Federal Court Judgment and the intent of the Judgment, then why do we need Federal Courts?

Additionally, of crucial importance to every United States citizen is whether or not in civil matters, unscrupulous attorneys

may charge the entire personal injury recovery in contingency attorney fees leaving their injured client not only with nothing but, after years of being in traumatic litigation, worse off than before the the case was filed.. In California, only citizens injured by health care providers are protected against this outrageous injustice. That policy violates the Equal Protection under the United States Constitution. No injured California citizen should be forced to pay attorney fees which exceed the amount medical malpractice plaintiffs are required ~~by~~ to pay by California statute.

IV. CONCLUSION

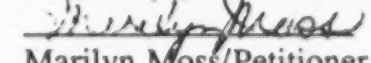
California Courts in this matter have thumbed their noses at the Federal Court system. By making the ruling they have rendered, they are in effect saying that when a case is successfully removed to U.S. District Court under ERISA, nevertheless, State Courts can jump in after the case has been resolved in Federal Court and change the Judgment so that the injured client ends up receivng absolutely nothing. That is not what the Congress intended when

drafting the Federal Rule of Civil Procedure 81(c) pertaining to removed cases. It is also contrary to what Congress intended when Congress enacted the ERISA and other Federal Civil Procedure statutes which are detailed above. Petitioner prays the United States Supreme Court will help all injured United States citizens by reviewing this case and sending a message that attorneys who run roughshod over their injured clients will not be rewarded as has occurred in this case at bar.

Petitioner prays this United States Supreme Court will look closely at the legal federal questions presented herein and issue a Writ of Certiorari so briefing of this matter may go forward. It is clear that the 9th and 10th Circuits have conflicting rulings concerning whether or not in a Federal Question case, state courts may litigate attorney fee petitions. The U.S. Supreme Court is the only Court which can resolve the conflict between circuits.

DATED: April 15, 1998

Respectfully submitted,



Marilyn Moss/Petitioner

PETITIONER APPENDICES

1. Underlying Moss v. Santa Fe Railroad U.S. District Court Judgment dated June 11, 1992.

2. Moss-Garrity Retainer Agreement.

3. California Court of Appeal Ruling.

4. California Supreme Court Ruling.

PEGGY GARRITY
A PROFESSIONAL LAW CORPORATION
1930 11th Street
Santa Monica, CA 90404

Telephone: (213) 396-4330

Attorney for Plaintiff

55-6

FILED

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARILYN MOSS,

Plaintiff,

-vs-

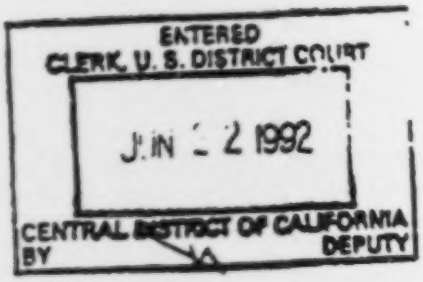
SANTA FE SOUTHERN PACIFIC CORPORATION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.; SANTA FE TERMINAL SERVICES, INC.; WILLIAM J. FITZGERALD; and DOES 1 through 20, inclusive,

Defendants.

BEST AVAILABLE COPY

CASE NO: CV 89-5909 KN (Ex)

JUDGMENT



Judge David V. Kenyon

Pursuant to stipulation of the parties, plaintiff Marilyn Moss and defendants Santa Fe Terminal Services, Inc. and The Atchison, Topeka and Santa Fe Railway Company, by and through Gary Crosby and Ronald W. Novotny, their respective counsel, and Peggy Garrity for Plaintiff Marilyn Moss, judgment is entered as of June 11, 1992, as announced in open court on June 11, 1992, in favor of plaintiff and against defendants The Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Terminal Services, Inc. jointly and severally, in the sum of $3,000,000 payable forthwith. If the

payment of $3,000,000 is not paid on or before June 26, 1992 the principal amount of the judgment shall increase by $100,000 and, after thirty (30) days, or July 11, 1992, shall thereafter increase by $500,000.

William Fitzgerald is dismissed from the action with prejudice and all parties waive and release all other parties, their attorneys and agents from any and all claims, whether known or unknown, and specifically waive t heir rights under California Civil Code Section 1542.

DATED: June 16, 1992

JUDGE OF THE U.S. DISTRICT COURT

Retainer Agreement

MARILYN MOSS (hereinafter referred to as "Client") engages the Law Offices of Peggy Garrity, A Professional Corporation (hereinafter referred to as "Attorneys"), to represent him/her in connection with any claims and damages client may have for sexual discrimination, sexual harassment and any other causes of action arising out of her employment with Santa Fe.

Client acknowledges that this matter has been handled by other counsel prior to Peggy Garrity's representation of Client and Peggy Garrity shall not be held responsible for any errors or omissions of prior counsel. No representation whatsoever is made as to the likelihood of success in this matter and, in particular with respect to the claim for retaliatory discharge based upon the letter of May 23, 1990. Attorney has agreed only to use her best efforts and skills to vigorously prosecute this matter.

Client agrees to pay for Attorneys' services in this connection

a contingent fee of 45% of the gross amount recovered if settled before MSC or arbitration hearing, or 45% of the amount received thereafter. A new fee arrangement will be made if there is an appeal. Non-contingent attorneys' fees and costs shall be paid by Client within ninety (90) days of billing.

If no recovery is obtained, no fee shall be payable to the Attorneys, except for such further fee arrangement in the event of an appeal or appeals.

Client shall advance all costs. If, however, attorney advances costs, client is to pay the same as billed and attorney shall deduct the same from client's share of any proceeds if such costs are not previously paid by client.

The above fee covers only the handling of Client's tort action or suit for injuries and damages to Client arising out of the conduct of said defendant. Any other matters handled by the Attorneys for Client are not included in the above contingent fee or hourly fee arrangement.

Attorneys may withdraw if they determine the chance of success and the potential recovery is outweighed by the effort and cost required to pursue the litigation to its conclusion and client agrees to thereupon substitute herself in as attorney of record or to obtain substitute counsel.

Attorneys are hereby given a lien on said claim or cause of action, on any sum recovered by way of settlement, and on any judgment that may be recovered by way of settlement, and on any judgment that may be recovered thereon, for the sum and share hereinbefore mentioned, as their fee; and it is further agreed that attorneys shall have all general possessory or retaining liens, and all special charging liens known to the common law.

It is agreed t hat Attorneys may retain their share out of the amount finally collected by suit or settlement or judgment in full for their services.

It is agreed that Attorneys have made no guarantees regarding the successful termination of said causes of action, and all expressions relative thereto are matters of opinion only.

\s\

\s\

February 25, 1992

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARILYN MOSS, B108006

Plaintiff and Appellant, (Super. Ct. No. LC 036968)

v.

PEGGY GARRITY, et al.,

Defendants and Respondents.

COURT OF APPEAL - SECOND DIST.
F I L E D
NOV - 4 1997
JOSEPH A. [illegible] Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Leon Kaplan, Judge. Affirmed.

Marilyn Moss, in propria persona, for Plaintiff and Appellant.

Sedgwick, Detert, Moran & Arnold and Rebecca R.

Weinreich for Defendants and Respondents Benedon & Serlin.

Nemecek & Cole, Jonathan B. Cole, Jason H. Bernthol and Karen K. Coffin for Defendant and Respondent Peggy Garrity.

This is an appeal from a judgment entered in favor of respondents for a demurrer was sustained without leave to amend. Appellant also requests sanctions from respondents "for misleading citations." We conclude the trial court did not err, and we affirm as well as deny the request for sanctions.

STATEMENT OF FACTS[1]

The Federal Action

In 1987, appellant, Marilyn Moss, filed suit against her employer Santa Fe Railroad, In Los Angeles Superior Court. Attorneys John Burton of Burton & Norris and John Huerta of

---

1

Because this is an appeal from ruling on demurrer, we state the facts based upon the verified complaint filed by appellant. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) However, we do not refer to contentions, deductions or conclusions of law. (Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125.)

Gronemeier, Barker and Huerta, represented appellant in action until January 1, 1991, when they were substituted out of the case. In October 1989, the suit was removed to the United States District Court, Central District, based upon a claim appellant asserted pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 United States Code section 1001, et. seq. Appellant's request for remand to state court was denied on February 22, 1990.

On January 27, 1992, appellant executed a retainer with respondent Peggy Garrity and substituted her into the federal action. appellant sent a letter to her former counsel, Burton and Huerta, advising them of the May 12 trial date and instructing them to furnish "a fee/cost statement if they believe[d] any fees or costs" were due for work done on the federal action. No such request [from former attorneys] was filed with the court or presented to appellant. Appellant sought attorneys fees in the federal action.

The federal action was tried for approximately one month but was resolved by stipulated judgment which was entered on June 22,

1992. The judgment provided for recovery by appellant of $3,000,000 against Santa Fe after which the action would be dismissed with prejudice. All parties released and waived any further claims. Garrity asserted her claim for contingent fees [from appellant] within 30 days of entry of the judgment.

The First Malpractice Action

On May 11, 1992, in order to toll the statute of limitations, Garrity filed a legal malpractice action in Los Angeles County Superior Court on behalf of appellant, case No. BC055044, naming Burton, Huerta, Burton & Norton, Gronemeier, Barker and Huerta, and Gronemeier & Baker as defendants. The complaint alleged negligence based on defendants' prosecution of the federal action on behalf of appellant.

On August 24, 1992, Gronemeier & Barker, as the successor to Gronemeier, Barker & Huerta, and Burton & Norris, collectively referred to as cross-complainants, filed a cross-complaint against appellant seeking recovery of attorney fees due for their

representation of appellant in the federal action. Their first cause of action was for breach of contract based upon a written retainer agreement signed by appellant and the second cause of action asserted a right to recovery based upon quantum meruit.

An answer to the cross-complaint was filed by Garrity on behalf of appellant on September 11, 1992. Among other affirmative defenses raised were the following:

"11. The original retainer agreement contained an arbitration provision and the filing of this cross-complaint repudiates any right of defendants/cross-complainants under said agreement."

"12. This answering cross-defendant has not been offered the opportunity at any time to arbitrate any fee dispute. As such, cross-complainants are barred from any recovery."

On October 30, 1992, Garrity substituted out of the malpractice action, advising appellant that a conflict of interest existed.

On March 15, 1993, appellant, in propria persona, filed a

request for dismissal of her malpractice complaint with the following notation: "Dismissal on the complaint was entered on January 28, 1993 and the cross-complaint was ordered to binding arbitration on October 15, 1992 by Judge Patti S. Kitching. Dismissal is requested according to C.C.P. Section 581." Pursuant to appellant's request, the malpractice action was dismissed.

On May 26, 1993, the arbitrators denied appellant's request for an indefinite stay, and they commenced the arbitration on the cross-complaint. Notice of the hearing had [allegedly] been served on appellant, but she did not appear. A Statement of Decision and Award was issued on that date in favor of the cross-complainants and against appellant in the sum of $654,833.33.

Cross-complainants sought and obtained judicial confirmation of the award on September 13, 1993. Again, appellant was [allegedly] served but she did not oppose the motion. Judgment was entered on that date against appellant in the total amount of $751,152.23.

On October 7, 1993, appellant noticed a motion to vacate the judgment, claiming, in addition to other arguments, that she had not received notice of the arbitration hearing, the award, or the confirmation proceedings. The following day she filed for voluntary bankruptcy. As a result, the trial court declined to hear the motion.

On February 2, 1994, appellant retained attorney Henry J. Walsh of Lawler, Bonham & Walsh, who filed a new motion to vacate judgment. The motion was based on two grounds: that appellant, mistakenly and excusably, had believed that her voluntary dismissal barred the arbitration; and that she had not received any notice of either the arbitration hearing, the award, cross-complainant's motion to confirm, or the judgment, until shortly before she filed her first motion to vacate in October of 1993. The motion was denied.

On August 29, 1994, appellant retained respondents Benedon & Serlin to appeal the denial of the motion to vacate the arbitration

award. On June 27, 1995, the court of appeal affirmed denial of the motion to vacate the judgment but struck attorneys fees which had been awarded by the trial court in the mount of $96,318.90. Petition for review by the [California] Supreme Court was denied. That part of the opinion addressing appellant's claim of excusable neglect is enlightening: "California Rules of Court, rule 385, obligated appellant to inform the trial court and respondents of her change of address. Failure to comply with this simple and salutary prescription - which would have assured notice of the confirmation motion -- cannot be deemed excusable, particularly on the part of a law school graduate who had personally handled lawsuits in this overall controversy. This case is effectively indistinguishable from Lint v. Chisholm (1981) 121 Cal.App.3d 615, in which a trained and experienced pro. per. litigant was denied relief for surprise or excusable neglect in failing to receive notice of trial, when '[a]dmittedly, he did not notify the clerk of any change of address after 'the closing of his business and filing of a dissolution action by

his wife during this time period disrupted his regular mail service.' (id. at p. 619.) Noting that both surprise and excusable neglect contemplate prudence and ordinary foresight, the court held that the appellant had not shown that '(1) his failure to notify the court of his address change, or alternatively to otherwise adequately arrange for mail delivery, was the act of a reasonably prudent person under the same circumstances; or (2) the nonreceipt occurred "without any fault of his own. . ."(Id. at p. 620.) So also here. Appellant's nonreceipt of notice was the result of excusable neglect or suprise, but of incautious inattention to ongoing litigation of which she was well conscious. Indeed, it is appellant's own account of her behavior -- not respondents' question of its credibility -- that stands inconsistent with her self-characterization as careful and tenacious in protecting her legal rights. The trial court did not abuse its discretion in denying appellant's motion to vacate the judgment."

The Instant Action

On May 7, 1996, appellant, in propria persona, filed a

verified complaint against the following: "Peggy Garrity, an individual, Peggy Garrity, a professional corporation; Henry J. Walsh, an individual; Tim Giles, an individual; Lawler, Bonham & Walsh, a partnership; Douglas G. Benedon, an individual; Gerald M. Serlin, an individual; Benedon & Serlin, a partnership and Does 1-10 inclusive, Defendants." Five causes of action were alleged against the defendants based upon their representation of appellant in defense of the cross-complaint in the first malpractice action.

The first cause of action against Garrity and her corporation for legal malpractice alleged six claims of errors and omissions: (1) failure to remove the cross-complaint to federal court (2) failure to assert the defense of lack of subject matter jurisdiction of the state court to entertain the cross-complaint; (3) failure to assert res judicata based upon the federal action in defense of the cross-complaint, (4) failure to advise appellant to dismiss the first legal malpractice case after the federal action had been successfully resolved in July, 1992; (5) "failure to assert the defense that under

California law, an attorney is prohibited from suing a client under a cause of action of breach of contract [pursuant to a contingency fee agreement]; and (6) "failure to assert that under California Business & Professions Code, binding arbitration as to clients is strictly voluntary."

The second cause of action for legal malpractice was asserted against all other defendants, including respondents Douglas Benedon, Gerald Serlin, and Benedon & Serlin, a partnership, collectively referred to as Benedon.[2]

The allegations of error and omission against Benedon numbered none: (1) failure to assert that the state court lacked subject matter jurisdiction of the claim for fees for work done in the federal action; (2) failure to raise the issue of res judicata based upon the federal action; (3) failure to assert that in California an attorney cannot sue a client for breach of [contingency fee] contract;

2

Henry Walsh, Tim Giles, and Lawler, Bonham & Walsh are not involved in this appeal.

(4) failure to assert, pursuant to California Business and Professions Code, that a client "cannot be forced to participate in binding arbitration if the client asks for a jury trial"; (5) failure to assert that the cross-complainants had no standing to sue appellant because they never had a contract with appellant; (6) failure to assert that the arbitration award was obtained by fraud when cross-complainants made false statements to the arbitrator; (7) failure to assert that "the arbitration award is not enforceable because of public policy which prohibits charging a client double attorney fees"; (8) failure to assert that $54,833.33 in prejudgment interest awarded by the arbitrators was improper and unlawful; and (9) failure to move the superior court for a new trial.

The third cause of action alleged breach of fiduciary duty against all defendants based upon the same errors and omissions alleged in the first two causes of action. In addition, it was alleged that Garrity "continuously assured [appellant] that she would help her defeat the [cross-complainants'] frivolous fee claim up to and

including November 13, 1995 but has declined to do so." It is also alleged that Benedon "breached their fiduciary duty of loyalty by failing to correctly advise [appellant] up to and including the adverse Court of Appeal ruling of June 27, 1995."

The fourth cause of action alleged breach of contract against all defendants, based upon the same facts alleged in the prior causes of action.

The fifth cause of action asserted that Benedon charged "excessive attorney fees in the sum of over $23,000 for work which is now known to be substandard."

Garrity and Benedon each demurred to the complaint. Benedon also filed a joinder in the demurrer filed by Garrity. Garrity asserted the bar of the statute of limitations, Code of Civil Procedure section 340.6 on each claim against her. This second argument attacked the foundation upon which appellant's claims were based: the assertion that cross-complainants could only recover attorney fees for services rendered her in the federal action by

timely filing a claim with the federal court in that action. Benedon asserted that the complaint did not state facts sufficient to constitute a cause of action, that it was uncertain, and that a separate action existed in which the claims should have been asserted.

The trial court sustained the demurrers without leave to amend. With regard to the demurrers on behalf of Benedon, the court stated: "First of all, as to number 29, the tentative is the order of the court, that is, the demurrer is sustained without leave to amend for reasons in the moving party's papers and the Joos case."[3] With regard to the Garrity demurrer, the court stated: "And with respect to number 30-A, the joinder motions are granted and the demurrer is sustained without leave to amend based on the Joos case and the reasons in the moving party's papers."

Judgment was entered on November 6, 1996, and notice of appeal was filed on November 27, 1996.

---

3 The case referred to is Joos v. Intermountain Health Care, Inc. (10th Cir. 1994) 25 F.3d 915.

DISCUSSION

Appellate Law and Appellant's Opening Brief

Trial court rulings which are not challenged in appellant's opening brief are deemed abandoned or waived. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 607, fn. 1; *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.) We will not consider issues raised for the first time in the reply brief. (*West v. Henderson* (1991) 227 Cal.App.3d 1578, 1585, fn. 5)

Appellant's opening brief addresses only the issue of whether the court erred when it relied upon the case of *Joos v. Intermountain Health Care, inc., supra.* It does not address any of the other independent legal grounds asserted in the demurrers filed by any of the respondents. This appears to have been by deliberate choice of appellant. In her opening brief appellant states: "Specifically, on October 29, 1996, Los Angeles Superior Court abused discretion when it sustained demurrer of the Garrity and

Benedon parties and all causes of action in this Moss v. Garrity, Benedon and Walsh case based solely on the 10th Circuit Utah case entitled Joos v. Intermountain Health Care, Inc. . ."(Italics added.) This statement is incorrect.

As previously noted, in open court, the court stated it was sustaining the demurrers "based on the *Joos cse and the reasons in the moving party's papers.*" (Italics added.) The notices of ruling served by each of the respondents also referenced all grounds in the moving papers. Benedon's ruling states: "Defendants Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon's Demurrer to Plaintiff's Complaint was sustained in its entirety without leave to amend *for all the reasons set forth in the moving papers* and the reasons articulated in *Joos v. Intermountain Health Care, Inc. . .*" (Italics added) Garrity's ruling states: "After reviewing submitted papers in support of and in opposition to the demurrer, Judge Kaplan sustained the demurrer without leave to amend *for the reasons set forth in the moving papers* and based upon the case of

Joos v. Intermountain Health Care, Inc. . . ." (Italics added.)

Each respondent argues that appellant has waived all grounds of appeal except the argument relating to *Joos*, citing the applicable legal principles of waiver and abandonment. In her reply brief, appellant does raise the issues ignored in her opening brief. However, this response is too late. Failure of appellant to address the other grounds raised in the demurrers serves as an independent basis upon which to affirm the judgment of the trial court.[4] Notwithstanding this determination, we will discuss the *Joos* case and the legal issues raised by it.

4

In addition, the only plea by appellant in her opening brief relating to amendment to her complaint is to allow deletion of four lines referencing failure to seek removal of the cross-complaint to federal court from the claims against Benedon. There is no other reference in the opening brief or in her reply brief to demonstrate how she could amend the complaint to avoid the legal issues presented. A failure to so demonstrate severly [sic] weakens appellant's argument that the trial court abused its discretion in denying leave to amend. (*Filice v. Boccardo* (1962) 210 Cal.App.2d 843, 847.)

The Jurisdictional Issue

Appellant's primcipal argument on appeal is that only the federal court had jurisdiction to rule on attorneys fees in connection with services rendered in *Moss v. Santa Fe Railroad.* Based on this assertion, appellant contends Garrity committed malpractice by failing to remove the claim to federal court, by failing to assert lack of jurisdiction of the state court to entertain the claim, and by failing to assert that the judgment in the federal case was res judicata. She asserts Benedon committed malpractice by failing to raise the last two issues on appeal.

Appellant argues that because the *Joos* case is a federal case it is not binding precedent and the trial court erred by relying on it. While appellant's point about the precedential value of federal cases in application of California law is correct, it is insufficient for two reasons. First, the legal theories discussed in *Joos*, and upon which the court based its ruling, are solid and comport with California law. Secondly, appellant's argument relates to application of

federal law; that only the federal court had jurisdiction to handle the claim of cross-complainants. Thus, *Joos* is directly applicable and defeats appellant's argument.

In *Joos*, plaintiff Carla Joos retained attorney R. Scott Waterfall to bring an action against Metropolitan Life Insurance Company to recover insurance benefits to pay Intermountain Health Care (IHC) for expenses incurred in relation to the birth and care of her daughter at McKay Dee Hospital, a division of IHC. She entered into a retainer agreement with counsel, who had a similar agreement with IHC. An action based upon ERISA was instituted in state court in Utah. Shortly after the matter was removed to the federal district court, Metropolitan agreed to pay to IHC an amount that settled its claim in full. Pursuant to ERISA, the district court ordered Metropolitan to pay $13,250 in attorney fees to Mr. Waterfall. He then requested that IHC pay the difference between the court awarded fees and the amount he was entitled to pursuant to his retainer agreement with IHC. IHC refused to pay the

difference. Mrs. Joos and Waterfall filed state claims against IHC and Metropolitan, including claims for breach of contract by IHC and interference with contract by Metropolitan. The defendants removed the case to the federal court on the basis that the federal court had jurisdiction because ERISA preempted plaintiffs' ability to bring state law causes of action. After removal, defendants filed a motion to dismiss for summary judgment on the ground that ERISA preempted and invalidated the state law claims. In response, plaintiffs moved to remand the case to the state court arguing that ERISA did not prempt their claims and the federal court had no jurisdiction over the state claims. Plaintiff's motion was denied, and defendant's motion to dismiss was granted on the basis that ERISA preempted the claims. The court of appeal reversed. It held that state claims which are only tangentially involved with a qualified benefit plan are not preempted by ERISA. It also held that the provision for attorney fees contained in ERISA is supplemental only and does not affect contractual rights between

an attorney and a client:

"Adopted in part to promote the enforcement of ERISA, it is clear that the attorney fees' provision of that statute was not intended to place a cap on the amount that a plaintiff's attorney may collect for his efforts. The award of attorney's fees in an ERISA case is simply intended to offset some or all of the plaintiff's costs because of the behavior of the defendant, and it in no way affects the contractual relationship between a plaintiff and his [or her] attorney.

[Citations.]"(*Joos v. Intermountain Health Care, Inc., supra,* 25 F.3d at p. 918.)

The concept that ERISA fees are only supplemental to whatever private arrangement exists between the parties is not unique to *Joos*. The United States Supreme Court in *Venegas v. Mitchell* (1990) 495 U.S. 82, 86, recognizes that private fee agreements may coexist with federal statutory awards of attorney fees. Appellant's retainer agreement with cross-complainants is

such a private fee agreement, upon which a state cause of action for breach of contract may be maintained. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 159-161.)[5]

California also recognizes that state law claims based on contractual rights ancillary to ERISA claims are not preempted by ERISA plans would in any way compromise the policies that ERISA was designed to promote. . . A legal malpractice claim "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan." (*Rebaldo v. Cuomo*, 749 F.2d 133, 139. . .) Nor does such a claim implicate "the relations among the

---

5

Accordingly, appellant's allegations of malpractice based upon the failure of respondents to assert that in California an attorney cannot sue a client for breach of contract lack merit. Additionally, appellant's allegation that cross-complainants had no standing to sue because they did not have a contract with appellant is equally without merit. The opinikon affirming denial of the motion to set aside the judgment specifically found that there was a written retainer agreement between cross-complainants and appellant. The same agreement provides for binding arbitration before the "State Bar of California or the Los Angeles County Bar Association. . ."

traditional [ERISA] plan entities[,]...[the] principals, the employer, the plan, the plan fiduciaries, and the beneficiaries."...''' (*Simon Levi Co. v. Dun & Bradstreet Pensiion Services, Inc.* (1997) 55 Cal.App.4th 496, 505, quoting *Custer v. Sweeney* (4th Cir. 1996) 89 F.3d 1156, 1167.) In fact, it was appellant's legal malpractice claim, filed in state court against cross-complainants, which triggered the transaction-related cross-complaint for recovery of attorney fees, a mandatory cross-complaint. (Code Civ. Proc., Section 426.30.) Thus, the malpractice action and related cross-complaint were independent state claims that were not preempted by ERISA and that would not sustain a claim of removal jurisdiction.

Additionally, while cross-complainants may have been able to assert a lien against appellant's proceeds in *Moss v. Santa Fe Railroad*, such lien can only be enforced by an independent action against the client after recovery in the main action. (*Bandy v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 230, 234.) Therefore, it would have been frivolous for any of the respondents

to urge that the judgment in *Moss v. Santa Fe Railroad* served as the foundation for a claim of *res judicata* to preclude recovery by cross-complainants.

The Retainer Agreement and Unconscionable Fees

In her opening brief appellant argues that Garrity was guilty of malpractice and breach of fiduciary duty because the fees provided for in the retainer agreement and collected by Garrity from the settlement in the federal action were exorbitant. In addition, she argues that the retainer agreement she signed when she hired Garrity was "unethical, unlawful and unconstitutional" and failed to comply with Business and Professions Code section 6147, subdivision (b). She urges she was further damaged by having to pay expert fees and other costs from her portion of the settlement. These theories were not alleged against Garrity in the complaint and were not tested by the demurrer. Therefore, the only relevance at this stage is whether these theories could support an amendment to the complaint. We conclude in the negative because they are barred by the statute of

limitations, one of the issues not addressed by appellant in her opening brief.

In opposition to Garrity's demurrer, appellant did suggest that Garrity's fees were unconscionable, however, not in the context of being able to amend the complaint but in response to the argument relating to the statute of limitations. Appellant's opposition discloses that the federal action was settled and that the judgment was paid on June 25, 1992, at which time Garrity deducted $1,350,000 in fees and also requested that appellant pay "approximately $300,000 out of [appellant's] portion of the judgment in expert fees, past medical bills, costs and loans. . ." Garrity ceased representing appellant on October 30, 1992. The malpractice complaint was not filed until May 7, 1996, almost four years after Garrity ceased her representation of appellant.

Code of Civil Procedure section 340.6 is the applicable statute of limitations for actions against an attorney:

"(a) An action against an attorney for a wrongful act or

omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

"(1) The plaintiff has not sustained actual injury;

"(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

"(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

"(4) The plaintiff is under a legal or physical disability

which restricts the plaintiff's ability to commence legal action.

"(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event."

Appellant did not assert a cause of action for fraud against Garrity, only claims of malpractice and breach of fiduciary duty. While breach of fiduciary duty can be a form of fraud, Code of Civil Procedure section 340.6 is still applicable. *(Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1366.)

The one-year provision of Code of Civil Procedure section 340.6 begins to run when the client "discovers, or should have discovered, the attorney's negligence and the client has sustained actual and appreciable harm. [Citations.] Speculative harm, or the threat of future harm arising from the breach of a professional duty, does not suffice. [Citation.] Ordinarily, the determination of the

time when a plaintiff suffered damages giving rise to a cause of action for attorney malpractice is a question of fact, but where there are no triable issues of fact as to when the plaintiff suffered such damage then a court may determine this as a matter of law. [Citations.]" (*Johnson v. Simonelli*)(1991) 231 Cal.App.3d 105, 109, disapproved on another point by *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245, 253.)

In this instance the facts are not in dispute. The federal case was settled and the proceeds of the settlement were paid on June 25, 1992. At that time Garrity received her fees and appellant paid approximately $300,000 in costs and other accrued items. Except for the fact that Garrity continued to represent appellant, the statute would have begun to run on that date. Garrity only continued to represent appellant until October 30, 1992, at which time Garrity was substituted out because of a conflict in interest. That is the date on which the statute began to run. We find no suggestion in appellant's brief or the record to suggest that appellant can

overcome this problem by amendment.

We conclude that the trial court did not err in sustaining the demurrers without leave to amend.

DISPOSITION

The judgment of dismissal is affirmed and the request for sanctions is denied. Costs are awarded to respondents.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

VOGEL, (C.S.),P.J.

EPSTEIN, J.

Second Appellate District, Division Four, No. B108006
S066408

IN THE SUPREME COURT OF CALIFORNIA

MARILYN MOSS, Appellant

v.

PEGGY GARRITY Et Al., Respondents

SUPREME COURT
FILED
JAN 21 1998
Robert Wandruff Clerk
DEPUTY

Petition for review DENIED.

I, Robert F. Wandruff, Clerk of the Supreme Court of the State of California do hereby certify that the foregoing is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 21st day of January A. D. 1998

Clerk.

By Deputy Clerk

GEORGE

Chief Justice

BEST AVAILABLE COPY

PROOF OF SERVICE

(xxx) BY MAIL

I am a resident of Orange County, California. I am over the age of 18 and not a party to the within action. My business address is 11230 Von Karmen, Santa Ana, CA. On April 18, 1998, I served the attached documents described as: PETITION FOR WRIT OF CERTIORARI on the parties-in-interest in this action by placing a true and correct copy thereof by First Class Mail, to the addresses listed as follows:

California Attorney General
Daniel E. Lungren
1300 I. St. #1101
P. O. Box 944255
Sacramento, CA 94244

California Supreme Court
303 - 2nd St. So. Tower
San Francisco, CA 94107

California Courts of Appeal
Second Appellate Dist, Div. 4
300 S. Spring St. 2nd Floor
Los Angeles, CA 90013

Nemecek & Cole
Jonathan Cole, Esq.
Karen Coffin, Esq.
15260 Ventura Blvd.
Sherman Oaks, CA

Sedgwick, Detert etal.
R. Weinreich
801 S. Figueroa St.
Los Angeles, CA 90017

Los Angeles Co. Clerk
Judge Leon Kaplan
Van Nuys, CA

I declare under penalty of perjury that the above is true and correct. Executed April 17, 1998, at Santa Ana, CA.

Jeale Johns